Appendix

History of Jurisdictional Act of 1925.

The Act of February 13, 1925 (43 Stat. 936) is the basis of the present certiorari jurisdiction of this Court. We present herewith a legislative history of that Bill, obtained from Committee Reports and other documents in the files of Congress.

Authorship.

> "The matter in some way came to the attention of the Judiciary Committee of the Senate. The Chairman of that Committee communicated with the Chief Justice and requested the Court, members of the Court out of their experience, to prepare a bill which would meet the situation. The Court hesitated at first, but as a result of further conferences between the Chief Justice and the Chairman of the Judiciary Committee of the Senate, the Court appointed a Committee which drafted a bill, and submitted it to the full Court."[7]

Sponsorship.

> "After the Committee of the Supreme Court had gone over the subject they reported it to all the members of the Court, in conference, and the matter was gone over several times and the draft revised *until it came to represent the composite judgment of the members of the court* as to what would operate well for litigants and at the same time enable the court to discharge in an appropriate way the functions which rightly belong to it."[8]

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[7]Testimony of Justice Van Devanter—Hearing before Committee on the Judiciary, House of Representatives—68th Congress, second session on H. R. 8206 December 18, 1924 at page 23.

[8]Testimony of Justice Van Devanter, Feb. 2, 1924 on Hearing before Sub-Committee of Committee on the Judiciary of United States Senate on S. 2060—68th Congress—at page 27.

Sponsorship in Congress.

The Bill—drafted by this Court—was introduced by Senator Cummins during the First Session of the 68th Congress as S. 2060. A copy was offered as H. R. 8206.

Justices Van Devanter, McReynolds and Sutherland testified before the Judiciary Committees of both Houses.

Chief Justice Taft acted as spokesman. His influence was behind the measure. His prestige assured enactment.

The measure which now appears as the Act of February 13, 1925 (26 Stat. 826, Chapt. 517) is H. R. number 8206 as amended by the Senate and confirmed in the House.

Purpose Explained in Senate Committee.

> *Justice Van Devanter:* "This Bill extends existing statutes so as to cover a larger number of cases. . . . It does away with the obligatory jurisdiction on appeal or writ of error, as to Circuit Court of Appeals cases, by providing that no case shall come from those Courts to the Supreme Court except on petition for certiorari."
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> *Justice McReynolds:* "The theory being that after two trials in a Federal Court *as of right—one of the District Court and one in the Circuit Court of Appeals* —the matter should end, subject to a discretionary review in the Supreme Court for some superior reason."
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> *Justice Van Devanter:* "That is true. No case comes into a Circuit Court of Appeals except it has passed already through the Trial Court, and when the Trial Court and the Circuit Court of Appeals *have both considered and decided it,* the Bill proceeds on the theory that the Supreme Court should not be required to review the case unless there be in it some question or matter of such importance as would cause

that Court in the exercise of a sound discretion to take the case".[9]

Debate in the Senate.

Senator Cummins stressed the basic right of every litigant—his absolute right to an appellate review—*and an appellate decision*—in *every case.*

> "It will be remembered that any case that reaches the Circuit Court of Appeals has already been tried in the District Court of the United States, *and when it is decided by the Circuit Court of Appeals* the litigant has had one trial in the District Court. He has had a second trial in the Circuit Court of Appeals".[10]

It was assumed that the Circuit Court would discharge its responsibility. The discussion centered upon the duty of this Court—*after decision in the Circuit Court.* The Senate was deeply concerned over a grant of discretionary power—even where limited to that situation:

> *Senator Reed:* "I think it is a Bill of such importance that it ought to have a full discussion on the floor. Speaking for myself, I want time really to study it. It is a very important Bill to be passed on lightly. With all the respect in the world for the Judges of the Supreme Court—and I entertain the very highest respect for them—I am not unmindful of the fact that it is our duty here to enact the statutes just as it is their duty to construe them. We must exercise our judgment."
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> *Senator Cummins:* "With respect to the constitutional question, I only repeat that those who have

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[9]Hearings before sub-committee of the Committee on the Judiciary—United States Senate, on S. 2060, 68th Congress, pages 28-29.

[10]Senate proceedings of January 31, 1925; Vol. 66, Congressional Record, page 2752.

confidence in the desire of the Supreme Court of the United States, to maintain a correct interpretation of the constitution, and not only to maintain a correct interpretation but to make that interpretation uniform or fairly uniform throughout the country, see no objection to making these reviews through the writ of certiorari instead of by appeal or writ of error."

Senator Walsh: "I desire to say that I feel a very keen interest in this measure, and I very much regret that I never had any opportunity to join in any consideration of it by the Committee on Judiciary. . . .

"I am . . . in harmony with the view expressed—that in those cases in which the jurisdiction of the Federal Courts is appealed to upon the ground of the existence of a Federal question, the right of appeal should end with the Circuit Court of Appeals except in so far as the Federal question is concerned. I think after a man has had a trial of a case on the merits of it in a District Court, in an equity case, for instance, *and then a trial on the merits of the case in the Circuit Court of Appeals,* a trial on the merits of a case in the Supreme Court of the United States is quite injustifiable. . . .

"Under a writ of error from a State Court . . . a review is not had upon the entire merits of the whole case, but there is a review simply of the Federal question involved. . . . I believe the same rule ought to prevail in respect to the cases that go to the Circuit Courts of Appeals. . . . *Mr. President, I find it difficult to yield to the idea that the Supreme Court of the United States ought to have the right in every case to say whether their jurisdiction shall be appealed to or not*".[11]

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[11]Senate proceedings of January 31, 1925; Vol. 66, Congressional Record, pages 2755-6.

There was an adjournment to February 3, 1925 to permit further debate. In the meantime the Bill, as drawn by the Committee of this Court, was passed by the House (66 Cong. Rec. 2917).

Debate was resumed in the Senate. The following letter was presented:

Supreme Court of the United States,
Washington, D.C.

December 9, 1924.

My dear Senator Copeland:

For two years our Court has been very anxious to secure the passage of a Bill to give us greater power of certiorari, so as to reduce the number of cases which come to us. . . . We wish to put into one statute the grounds and method of appeal both to the Circuit Courts of Appeals and to us. Our court appointed a Committee that worked a full year on the subject and got together a Bill, and the court approved. It was introduced last session by Senator Cummins, and was recommended to the Senate by the Judiciary Committee. The Bill is opposed by Senator Thomas Walsh and Senator Shields on the ground that they do not believe in giving to our court greater jurisdiction in certiorari. They think it vests in us too much discretionary power. . . .

The theory of our system is a correct one, namely, that the District Court and the Circuit Courts of Appeals shall furnish all the hearings that any litigant should have, and that the business of the Supreme Court should be to consider and decide for the *benefit of the public* and for the benefit of *uniformity of decision* only questions of importance. The appeal to us should not be based on the right of a litigant to have a second appeal. We don't, of course, in hearing on application for certiorari decide the case

presented on the merits. We could not do that without a full hearing but it is entirely possible for us to determine the character of the question and the importance of our taking up the time of the court to hear and decide it. . . .

Sincerely yours,

Wm. H. Taft.[12]

Primary Responsibility in Circuit Courts.

". . . *litigants have, first, a trial in the District Court and then, by appeal or writ of error, a trial in the Circuit Court of Appeals—a court that ranks as high or higher than the Supreme Tribunals of the States.* It is our belief that here ordinary litigation should end and that the cases should not go to the Supreme Court of the United States unless the questions involved are of grave public concern or unless uncertainty attends the decision of the Circuit Court of Appeals by reason of conflict in the rulings of these Courts or the Courts of the States. *It is believed the right of the Circuit Courts, to certify questions to the Supreme Court and the right to file a petition for certiorari will furnish ample opportunity for all cases to go from the Circuit Court of Appeals to the Supreme Court which ought to be heard by the latter tribunal.*"[13]

Ultimate Responsibility in the Supreme Court.

Section 240 of the Judicial Code was amended by the Act of 1925 to read as follows:

"In *any case,* civil or criminal, in a Circuit Court of Appeals, . . . *it shall be competent* for the Su-

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[12]Letter appears as part of Senate proceedings of Feb. 3, 1925; Vol. 66, Congressional Record, page 2920.

[13]Report of Sub-Committee of Judiciary Committee of United States Senate on S. 2060—68th Congress, 1st Session (Report No. 362) at page 3.

preme Court of the United States, upon the petition of *any party* thereto, whether Government *or other litigant,* to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Due process, as guaranteed by the Fifth Amendment, requires the exercise of that power in accordance with proper judicial standards.

This Court acted promptly to implement the new law. It adopted Rule 38. That rule recognized the duty to guarantee due process in the Circuit Courts. It provided that certiorari would issue when,

> *". . . a Circuit Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."*

Other Representations Made to Congress to Procure Enactment of Judiciary Amendments.

". . . the Court is hindered from hearing and determining more important cases and from functioning in the performance of its highest duty of *interpreting the Constitution* and *preserving uniformity of decision* by the intermediate Courts of Appeals.

"Although final decisions will be multiplied in the intermediate Courts of Appeals by this Bill, if it shall become a law, yet *every case now reviewable by the Supreme Court under existing law will still be reviewable by that tribunal whenever a question is presented which is of sufficient importance* in the opinion of the

Supreme Court. . . . Through this discretionary power there can and will be a weeding out of all *trivial* and *unimportant cases;* cases brought for delay; cases which cover matters already decided, etc., so that rapidity of action will be achieved; and *the public questions—the vital and important ones—will be reviewed, considered, and decided. . . .*"[14]

Consideration Given to Applications.

"Lest it should be thought that the increase of discretionary jurisdiction might *impair the administration of justice* and lead to *partial hearings* and not secure a decision by the *whole court,* it is proper to call attention to the very thorough and complete system by which discretionary jurisdiction is exercised. In granting or refusing a prayer for certiorari the petitioner gets the judgment of the whole court. The application is not disposed of by a single Justice. The luminous and informing statement of Mr. Justice Van Devanter tells the whole story:

" 'While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, *this does not mean that the Court is authorized merely to exercise a will in the matter* but rather that the petition is to be granted or denied *according to a sound judicial discretion.* . . . Copies of the printed record as it came from the Circuit Court of Appeals and of the petition and briefs are distributed among the members of the Supreme Court, and each judge examines them and prepares a memorandum or note indicating his view of what should be done.

" 'In conference these cases are called, each in its turn, and each Judge states his views in extenso or

[14]Report of House Judiciary Committee on H.R. 8206—68th Congress, 2nd Session—Report Number 1075 at pages 2-3.

briefly as he thinks proper; and when all have spoken any difference of opinion is discussed and then a vote is taken. I explain this at some length because it seems to be thought outside that the cases are referred to particular judges, as, for instance, that those coming from a particular circuit are referred to the Justice assigned to that Circuit, and that he reports on them and the others accept his report. *That impression is wholly at variance with what occurs.*

"'*We do not grant or deny these petitions merely according to a majority vote.* We always grant the petition when as many as four think it should be granted and sometimes when as many as three think that way. *We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.*'"[15]

Absolute Right of Review in Cases Presenting Conflict.

". . . it is the *invariable practice* of the Supreme Court, in cases which have been differently decided by Circuit Courts of Appeals to allow a writ of certiorari. *The effort is to bring the law of the United States into uniformity.*"[16]

Standards Governing Action of Supreme Court.

Mr. Justice Van Devanter: "I deem it well to state further the lines on which the Court proceeds in determining whether a writ of certiorari shall be granted. The inquiry is, first, whether or not the case is one in which a petition for certiorari will lie at all; next, whether the questions presented in the case are of wide or public importance or concern only

[15]Report of House Judiciary Committee on H. R. 8206—68th Congress—2d Session—Report No. 1075 at pages 2-3.

[16]Statement by Senator Cummins during Senate proceedings held on Jan. 31, 1925 (66 Cong. Rec. 2754).

the parties to the particular case; next, whether there is any conflict between the decision that is complained of and decisions on the same question in other Circuit Courts of Appeals or in the Supreme Court; and next, if any of the questions determined by the Circuit Courts of Appeals be questions of State Law, whether if not there is a conflict between the decisions of that Court thereon and the decisions of the Court of last resort in the state on the same questions. *Whenever we find such a conflict, that, without more, leads to the granting of the petition, if the case be one in which a petition for certiorari will lie.*"[17]

Probable Cause.

Mr. Justice Van Devanter: "I would say that the granting of the writ means only that the Court and all of its members understand that, in the entire environment of the case, it is one that should be argued at length before them, be considered by them in the light of that presentation and then deliberately decided. *Granting the writ alone means, and only means, that the Court finds probable cause for a full consideration of the case in ordinary course.*"[18]

A Definite Understanding—for the Record.

Justice Van Devanter: ". . . this does not mean that the Court is authorized merely to exercise a will in the matter. . . .

". . . . We do not grant or deny these petitions merely according to a majority vote. . . ."

Mr. Montague: "Is it the purpose of the Court still to exercise very careful scrutiny under the discretionary power in the method you have indicated?"

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[17]Testimony Feb. 2, 1924 on Hearing before Sub-Committee of Committee on the Judiciary of Senate on S. 2060, 68th Congress, at pages 29-30.

[18]Senate Committee testimony page 30.

Justice Van Devanter: "It is."

Mr. Montague: "Although you ask for discretionary power, you propose to exercise it in the method you have heretofore exercised it?"

Justice Van Devanter:. "Certainly. Of course, we could not maintain an institution and make it accomplish its purpose unless we did, and there is no purpose to do anything else."

Mr. Montague: "I think I understand, but I wanted the record to show that."[19]

Proceedings Before Congress in 1935.

Senate Bill 2176 (74th Congress, 1st Session), sought to provide direct appeal and immediate review in cases where a restraining order prevented enforcement of Federal Law.[20] There were hearings before the Senate Judiciary Committee. On invitation, Chief Justice Hughes attended with Justices Van Devanter and Brandeis. The proceedings had on March 25, 1935 include the following:

Statement of Chief Justice.

"At the outset let me say that I am authorized to speak for all members of the Court, without exception, and, as you have indicated, I have asked Mr.

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[19]Statement before House Committee at page 18.

[20]This measure, offered by Senator Black, read as follows:

"Be it enacted. . . . That when any judge or court of the United States issues any restraining order, decree, judgment, or injunction prohibiting any Federal Official or employee or Federal Agency or Bureau, or any other person or agency from carrying out the purposes of, or acting under the provisions of any Federal Law, an appeal by the United States shall lie from such restraining order . . . directly to the Supreme Court . . ."

Justice Van Devanter and Mr. Justice Brandeis to accompany me as a Special Committee of the Court, in order that you may have the benefit of their long experience in connection with appellate procedure.

"I desire to submit certain considerations which we feel should be entertained by your Committee in an examination of this proposed measure.

"First, we regard the Bill as unnecessary. The Supreme Court has now the power to bring before it by certiorari any case of the sort described in the Bill in advance of decision by the Circuit Court of Appeals. . . . That power of the Court to bring up cases by writ of certiorari in advance of decision by the Circuit Courts of Appeals was declared many years ago by the Act of March 3, 1891. . . .

"The next consideration that I would call to your attention is that this Bill, we think, would impose a very heavy burden upon the Supreme Court. . . . It seems to me that it is very necessary that, in order that the Supreme Court may properly discharge its very important function, there should be some discrimination, some method of selection in determining the cases that are brought before it. If there is to be a method of selection, who is to make the selection? . . .

"The Court does constantly have to make these selections. Under the Jurisdictional Act of 1925 there are only a limited number of cases in which the right of appeal to the Supreme Court is allowed, and the Court determines on application for certiorari what cases should be brought before the Court. That is a very important exercise of authority, and there is nothing that we do to which we give greater attention with reference to the protection of the jurisdiction of the Supreme Court and its appropriate exercise.

"The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, or because of the character or prominence of the parties, or because of counsel. The question before the Supreme Court is, manifestly, the importance of the question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. To consider these various applications with respect to that, not as to the parties, not as to the amount of money involved, not as to counsel, but as to the law. *The parties have a right of appeal to the Circuit Court of Appeals.* That satisfies the rights of individual litigants. When it comes to a *further review* by the Supreme Court of the United States, the higher principle of importance to the public at large is involved."[21]

Statement of Justice Van Devanter.

"Petitions for certiorari are not determined by a majority vote. If as many as four members of the Court, which is a minority, vote for granting a petition for certiorari, it is invariably allowed. Mr. Justice Brandeis (present as a member of the committee of the Court) has been on the Court for 20 years, and he will not recall a single instance in all that period where a petition for certiorari which commended itself to four members of the Court was not granted. That is a rule that is understood and adhered to, and it works well. *The point is that in exercising that certiorari jurisdiction the Court desires to be at fault in taking jurisdiction rather than to be at fault in rejecting it.* That rule is not one of

[21]Hearing before Committee on the Judiciary—United States Senate (74th Congress, 1st Session) on S. 2176, March 25, 1935 at pages 6-7.

recent years. It originated before almost all of the members of the Court ever thought of being there."[22]

Congressional Action in 1937.

Senate Bill 1392—introduced during the First Session of the 75th Congress—provided for Reorganization of the Judiciary. There were hearings before that Committee in the Senate. These included study of the jurisdiction on certiorari—the principles and practical operation of that method of review.

The Report of the Senate Committee contains the following exhibit:

"Supreme Court of the United States.
Washington, D. C.

March 21, 1937

Hon. Burton K. Wheeler,
United States Senate,
Washington, D. C.

My dear Senator Wheeler:

In response to your inquiries, I have the honor to present the following statement with respect to the work of the Supreme Court:

1. The Supreme Court is fully abreast of its work. . . .

2. The cases on our docket are classified as original and appellate. . . . Our appellate jurisdiction covers those cases in which appeal is allowed by statute as a matter of right and cases which come to us on writs of certiorari. . . .

3. The statute relating to our appellate jurisdiction is the Act of February 13, 1925 (43 Stat. 936). That

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[22]Senate testimony at pages 9-10.

act limits to certain cases the appeals which come to the Supreme Court as a matter of right. Review in other cases is made to depend upon the allowance by the Supreme Court of a writ of certiorari. . . .

"Where the appeal purports to lie as a matter of right, the rules of the Supreme Court (Rule 12) require the appellant to submit a jurisdictional state ment. . . . 'We examine that statement. . . . *As a result, many frivolous appeals are forthwith dismissed and the way is open for appeals which disclose substantial questions.*

4. The Act of 1925 limiting appeal as a matter of right and enlarging the provisions for review only through certiorari was most carefully considered by Congress. I call attention to the Reports of the Judiciary Committees of the Senate and House of Representatives (68th Cong., 1st Sess.). That legislation was deemed to be essential to enable the Supreme Court to perform its proper function. . . . Hosts of litigants will take appeals so long as there is a tribunal accessible. . . . Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar, and *get in the way of those that have merit.*

Under our Federal system, when litigants have had their cases heard in the courts of first instance, and the trier of the facts, judge or jury, as the case may require, has spoken and the case on the facts and law *has been decided,* and when the dissatisfied party has been accorded an appeal to the Circuit Court of Appeals, the litigants, so far as mere private interests are concerned, have had their day in court.

"If *further review* is to be had by the Supreme Court it must be because of the public interest in the questions involved. That review, for example, should be for the purpose of *resolving conflicts* in judicial decisions between different circuit courts of appeals

. . . or for the purpose of *determining constitutional questions* or settling the *interpretation of statutes;* or because of the *importance of the questions of law* that are involved. Review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants. . . .

"Granting certiorari is *not a matter of favor* but of *sound judicial discretion.* It is not the importanee of the parties or the amount of money involved that is in any sense controlling. The action of the Court is governed by its rules. . . .

"*These rules are impartially applied, as it is most important that they should be.*

"I should add that petitions for certiorari are not apportioned among the Justices. In all matters before the Court, except in the mere routine of administration, all the Justices—unless for some reason a Justice is disqualified . . . participate in the decision. This applies to the grant or refusal of petitions for certiorari. Furthermore, petitions for certiorari are granted if four justices think they should be. *A majority vote is not required in such cases. Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote.* . . .

"I think it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. *The remainder, falling short, I believe of 20 percent, show substantial grounds and are granted. I think it is the view of*

the members of the Court that if any error is made in dealing with these applications it is on the side of liberality. . . .

"On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the Justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter, and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

Respectfully yours,
Charles E. Hughes,
Chief Justice of the United States.

Hon. Burton K. Wheeler,
United States Senate,
Washington, D. C."[23]

[23]Adverse Report of Senate Committee on the Judiciary in regard to Senate Bill 1392 (75th Congress, 1st Session)—Report No. 711, Calendar No. 734, at pages 38-40.